IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO. 2481 OF 2005
IN
WRIT PETITION NO. 4000 OF 2005

Kaivalyadhama Employees'
Association
C/o. Mr. S.B. Sakhalkar
Secretary,
House No.2, Shivaji Building,
BHANGARWADI, LONAVALA,
DIST- PUNE ..Applicant
(Org.Respondent)

Vs.

Kaivalyadham S M Y M Samiti
Lonavala, Dist. Pune ..Respondent

Mr. Nitin A. Kulkarni for applicant.
Smt.Meena H. Doshi for respondent.

CORAM: B.H. MARLAPALLE, J.
Date : August 31, 2006.

P.C.:

1. Heard Mr. Nitin Kulkarni the learned counsel for the applicant-Union and Smt. Meena Doshi the learned counsel for the respondent-management.

2. Writ Petition No.4000 of 2005 filed by the management challenging the award of the Industrial Tribunal at Pune in Reference (IT) No.13 of 1998 and passed on 2/3/2005 has been admitted and the implementation of the said award has been stayed by

this court as per the order dated 21/7/2005. The said award of the Industrial Tribunal had directed reinstatement of 12 workmen represented by the applicant-Union and hence the Union has taken out this civil application praying for extension of the benefits under Section 17B of the Industrial Disputes Act, 1947. The said section reads as under:-

> "**17B. Payment of full wages to workman pending proceedings in higher courts**.- Where in any case, a Labour Court, Tribunal or National Tribunal by its award directs reinstatement of any workman and the employer prefers any proceedings against such award in a High Court or the Supreme Court, the employer shall be liable to pay such workman, during the period of pendency of such proceedings in the High Court or the Supreme Court, full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any rule if the workman had not been employed in any establishment during such period and as affidavit by such workman had

been filed to that effect in such court:

. Provided that where it is proved to the satisfaction of the High Court or the Supreme Court that such workman had been employed and had been receiving adequate remuneration during any such period or part thereof, the court shall order that no wages shall be payable under this section for such period or part, as the case may be."

. The plain reading of this section goes to show that to defeat the application under Section 17B it must be shown before the court that, (a) the workman concerned is employed in any establishment during the pendency of the petition, (b) an affidavit by the workman had not been filed stating that he was not employed in any establishment and (c) he had been receiving adequate remuneration during such period or part thereof.

3. Out of the 16 workmen who were retrenched with

effect from 19/3/1997, the Industrial Tribunal directed reinstatement of the following 12 workmen whose details as on that date are set out against each name:-

Sr. No.	Name	Date of joining/ regular-isation	Post	Total monthly emoluments (Rs.)
1.	Mr.K.G.Sanyal	26.09.78	Sr.Steno	4,661.00
2.	Mrs.S.H. Gupta	01.04.85	Store Keeper	4,033.00
3.	Mr.D.G. Kokate	01.12.84	Driver	3,152.00
4.	Mr.C.M. Shelar	01.08.90	Techincal Assistant	2,391.00
5.	Mr.B.V. Gugale	06.08.84	Mali	2,418.00
6.	Mr.A.S. Kute	12.02.88	Techinal Assistant	2,450.00
7.	Mr.R.S. Hulawale	-	Casual Labour	-
8.	Mr.M.D. Marathe	-	Casual Labour	-
9.	Mr.K.G. Khandebharad	-	Casual Labour	-
10.	Mr.G.C. Mohite	01.04.83	Daftary	2,569.00
11.	Mr.V.K. Ingulkar	01.10.88	Helper	2,210.00
12.	Mr. Mausum Ali	01.04.85	Mason	2,499.00

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4. In support of this application, affidavits of the workmen concerned have been filed purportedly in compliance with the requirements of Section 17B of the I.D. Act. However, it is admitted that Mr.K.G. Sanyal and Mr. Mausum Ali are not presently residing at Lonavala, where the respondent-establishment is located and they have returned to their native States. I, therefore, deem it appropriate to consider this application in respect of remaining 10 workmen only i.e. from Serial No.2 to 11 above. The affidavits initially filed along with the application by the 10 workmen could be divided into two groups. The first group of three workmen who contended that they were not employed gainfully, whereas remaining six workmen in their affidavits admitted that as and when petty labour work was available they were accepting the same and earning monthly amount of Rs.300/- to Rs.700/-. Whereas Mr. M.D. Marathe had stated in his affidavit that he was carrying on agricultural operations along with his brother and was earning Rs.1000/- per month.

Thus, on the face of the affidavits submitted by these seven workmen, though they were engaging themselves in petty labour work, they were not employed in any establishment as per their affidavits. The first group of three workmen also contended that they were not working in an establishment.

. One Mr. Agarwal filed an affidavit on behalf of the management on 29/9/2005 and did not deny the contentions of Mr. C.M. Shelar, Mr. Raghunath S. Hulawale, Mr. D.G. Kokate, Mr. G.C. Mohite and Mrs.S.H. Gupta and in respect of others it was pointed out that they were either self employed or running a tea stall or working as security watchman etc. These five workmen, namely, Mr. K.G. Khandebharad, Mr. V.K. Ingulkar, Mr.B.V. Gugale, Mr.A.S. Kute and Mr. M.D. Marathe filed their affidavits on 3/10/2005 in rejoinder and denied that they were employed or were self employed as contended in the affidavit of Mr. Agarwal. In turn, Mr.Agarwal filed an affidavit on 6/12/2005 on behalf of the management and contended that all the ten workmen were employed and none of them were entitled for the

benefits under Section 17B of the I.D. Act. Per contra, these workmen filed fresh affidavits on 19/12/2005 and denied the allegations of Mr.Agarwal that they were individually working in any establishment, except Mr. Kute, Mr. Marathe and Mrs.Gupta. The management then decided to engage a detective agency to ascertain the gainful employment of the concerned workmen. The said agency vedio-taped by visiting either residences of these workmen or the places where they were working and submitted a CD before this court. It is also admitted that original CD has been submitted before this court and a copy thereof has been served on the learned counsel for the applicant-Union.

5. Mrs.Doshi the larned counsel appearing for the management in support of her arguments to oppose this application submitted that the workmen who stated that they were not gainfully employed were impliedly employed but were not getting adequate remuneration and, therefore, it was necessary for them to give the details of such inadequate employment. They have not done so. In addition, the remaining workmen who

admitted that they were engaged in petty labour work were required to give the days on which they were working in a month, the rate of their wages and the names of the establishment etc. The failure of the workmen to furnish all these details is itself sufficient to reject their claim for the benefit under Section 17B, as per Mrs.Dhoshi and she further urged before this court that it would be appropriate that the application is remanded to the court below for recording evidence of the respective parties on the line of the proceedings in an application filed under Section 33C(2) of the I.D. Act. As per Mrs. Doshi when the management has furnished the nature of employment, the onus was on the concerned workmen to prove by acceptable evidence that they were not gainfully employed in any establishment.

6. Going by the first affidavit of Mr.Agarwal filed on 29/9/2005 the five workmen in respect of whom the employment details were sought to be furnished, it is clear that except Mr. M.D. Marathe the other four were not shown to be working in any establishment as such and Mr.Marathe was claimed to be working at Hotel

Centre Point but not details of such employment were placed on record along with the affidavit. A certificate of employment or a copy of the wage slip or any other documentary proof that Mr.Marathe was working with Hotel Centre Point could have been furnished and more so even in the second affidavit dated 6/12/2005 Mr.Agarwal emphasised that Mr.Marathe was working as a Cook at Hotel Centre Point and so far as the remaining five workmen were concerned, namely, Mr.C.M. Shelar, Mr. R.S. Hulawale, Mr.D.G. Kokate, Mr.G.C. Mohite and Mrs. S.H. Gupta the affidavit dated 29/9/2005 remained silent about their employment anywhere. But in the affidavit submitted on 6/12/2005 Mr. Agarwal contended that Mrs.Gupta was working as a Clerk in her husband’s office, Mr. Mohite was working as a Mali at the Bungalow of one Mr. Shirvalkar, Mr.D.G. Kokate as a driver but the name of the employer was not furnished, Mr. Raghunath Hulawale was claimed to be working as security watchman at Lawate Security but no proof of such employment was placed on record in the forms as stated earlier in the case of Mr.M.D. Marathe and in respect of Mr.C.M. Shelar the affidavit dated 6/12/2005 claimed that he

was self employed as a milk vendor.

7. Let us see the CD transcription reduced in writing in respect of some of these 10 workers.

(a) Mr. C.M. Shelar - Currently not doing any business of milk vendor. Whereas his brother Eknath Shelar is doing the same business. Brother owned 20 buffaloes and two of them are with Mr.Chandrakant and presently Chandrakant is doing farming. As per the statement made by the wife and son of Chandrakant, he earns Rs.40,000/- per annum from his farming activities.

Admittedly, there is nothing in this transcription also about having employed in any establishment as such.

(b) Mr.Kisan Khandebharad - Tulsi Sadhana Kutir is a Hotel runs by a Gujrati Trust. Mr.Khandebharad is looking after all the purchase and other thing in the Hotel

(recorded in the CD as a proof).

It is not known who made the statement and whether it was accepted by any office bearer of the Gujrati Trust or by Mr.Khandebharad.

(c) Mr.Vishnu K. Ingulkar - He is not working with M/s. Lawate Security. His wife stated that Vishnu is working as a Mali cum watchman in a bungalow at Lonavala which is recorded in the CD.

Working in a bungalow as a watchman cum mali will not amount to an employment in an establishment unless it was demonstrated that the said bungalow belongs to some establishment.

(d) Mr.Raghunath Hulalwale - We enquired with M/s. Lawate Security regarding Mr.Raghunath Hulawale and came to know that presently he is not working with them. When we enquired at his residence, we came to know that Mr.Raghunath is not working anywhere because

> he is not physically well and he is at home only. His wife earns for their family.

This recorded statement itself supports his case that he is not employed.

> (e) Mr. Bandu B. Gugale - First of all we enquired at Chawanwada, Vadgaon whichis 40 km. far from Tangurli, we came to know that his house is at Chawanwada only but he does not stay there. Then we enquired at Tangurli and came to know that he was a mali at Tangurli years back and now he does not do the work of Mali. Currently he runs a small tea shop (tea, cigarette, tobacco etc.) just opposite the gate of Ravi Valley Estate along with his wife. He has 2 sons and they have one more shop near to Hotel Aasina.

This transcription also does not indicate that he is employed in any establishment and he is helping his wife in running the tea shop (tea, cigarette, tobacco etc.). That cannot be termed as an employment with an

establishment.

> (f) Mr. Ananta S. Kute - First of all we enquired at Tungarli at his home and came to know that his brother stays there. Then we enquired at old valley and came to know that he is working as a Mali at bungalow for last so many years with his family. he earns Rs.4500/- p.m. as he works for 3-4 bungalow at old valley.

The names of the bungalow owners have not been stated, the source of giving this information has not been stated and the statement made about the employment does not name any owner or any manager of such a bungalow giving the said information and, therefore, this statement cannot be considered.

8. As far as Mrs.Gupta is concerned, even if it is presumed that she is assisting her husband or she is doing the duties of a Clerk in her husband’s office, that itself cannot be called as a gainful

employment with an establishment, if regards be had to the Judgment of this Court in the case of Hindustan Petroleum Corporation Limited vs. D.N. Vidhate and anr. **[2003 (5) Bom.C.R. 482]**. In that case the workman-husband was assisting his wife in her business and while opposing the application under Section 17B of the I.D. Act his visiting card was placed on record by the employer in support of the contentions that he was gainfully employed. Accepting the fact that he may be assisting his wife, this court stated,

> "Undoubtedly, the fact of printing of visiting cards with the name of the employee has not been denied. However, merely on the basis of the visiting cards, it is not safe to conclude that the employee is gainfully employed so as to deny him the benefit under section 17B of the said Act when the specific case of the employee is to the effect that he had been assisting his wife in her business and the materials on record disclose that the business indeed belonged to his wife."

9. A Division Bench of this Court in the case of M/s. Oriental Containers Ltd. vs. Engineering Workers Association and anr. **[1996 (3) Bom.C.R. 488]** also had an occasion to consider the requirements to entertain an application under Section 17B of the I.D. Act and more particularly the issue of gainful adequate employment and the onus to prove the same. The Division Bench stated, inter alia, thus,

> "....Section 17B of the I.D. Act requires a workmen to file an affidavit before the High Court or the Supreme Court where the employer has preferred any proceedings against the Award of reinstatement of the workman that he "had not been employed in any establishment" during the pendency of such proceedings. Once such an affidavit has been filed by the workman, he has discharged the onus on him. By virtue of the provisions of section 17B, the burden of proof then shifts to the employer. It is then for the employer to satisfy the High Court or the Supreme Court that the workman, in fact, had been employed

and he had been receiving adequate remuneration during such period or part thereof. If the employer succeeds in satisfying the Court in that behalf, the Court then shall order that the wages contemplated by this section shall not be payable by the employer to the workman for the period of the pendency of the proceedings before the Court or part thereof. In the instant case, the workmen have discharged the burden of proof cast upon them. The employer has not placed any material before this Court that the workmen had been receiving adequate remuneration during this period. The employer has referred to a report of some detective agency but has not filed an affidavit stating that the report has been accepted to be correct. The report of the detective agency is not, per se any evidence. Evidence has to be led in proof thereof and no evidence has been led in the instant case and no reliance can be placed upon the report of the detective agency as is sought to be contended. The

> employer has successfully succeeded in preventing the workmen from getting the benefit of the benevolent provisions contained in section 17B of the I.D. Act."

10. On the face of the evidence that was sought to be placed before this court by the employer along with the affidavits filed by Mr. Agarwal opposing this application, it cannot be said that any of the ten workmen are or were gainfully employed during the pendency of this petition in any establishment and were/are in receipt of adequate remuneration. Working as a petty labourer is not employment in an establishment and at the same time it was not a regular job. Such employment is obviously as and when and wherever available. The submissions of Mrs.Doshi that the trial court be directed to record evidence as is done in the proceedings instituted under Section 33C (2) of the I.D.Act cannot be considered as the scheme of Section 17B does not envisage such an exercise. Mrs.Doshi also pointed out by referring to some correspondence between the management and the Government of India to the effect that if these 10 to 12 workmen are reinstated, the financial burden will have to be borne by the management alone and the

Central Government would not contribute anything towards the same. The management is running a Hospital, a College and Yoga Research Centre etc. These 10 workmen were employed by the management-Trust and they were not the employees of the College, Hospital or Yoga Centre as a separate establishment.

11. In the premises it is clear that the employer failed to defeat this application inspite of series of affidavits and the CD having been placed before this court.

12. The application, therefore, succeeds and the same is hereby allowed in respect of the above 10 workmen.

13. It is made clear that the management is at liberty to approach this court for variation of this order in case it comes in possession of adequate material showing that any of these workmen is employed with an establishment during the pendency of this petition.

14. Mrs.Doshi the learned counsel for the management also pray for listing the petition for

final hearing and pointed out that in Civil Application No.2480 of 2005 which was filed for fixing the petition for final hearing, she was granted liberty to revive the prayer. As at present it does not appear to be possible to give any specific date as the matters on board for final hearing before me pertain to the period from 1987 to 1994. However, the management is at liberty to take out a fresh application praying for fixing an early date of hearing of the petition.

15. Mrs. Doshi the learned counsel at this juncture made an oral application for stay to this order. The application is hereby rejected.

(B.H. Marlapalle,J.)